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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THOMAS DUNPHY et al., Plaintiffs and Appellants, v. ROBERT WALSH, Defendant and Respondent.	B283412 (Los Angeles County Super. Ct. No. BC586230)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bobbi Tillmon, Judge. Affirmed.

Law Offices of Farrah Mirabel and Farrah Mirabel; Alan Goldberg for Plaintiffs and Appellants.

McNeil Tropp & Braun, Jeff I. Braun and Kendall L. Craver for Defendant and Respondent.

INTRODUCTION

Appellants were plaintiffs in a personal injury action involving an automobile collision. The action went to jury trial and the jury found Respondent was not negligent. Appellants seek reversal of the judgment in favor of Respondent, arguing the trial court erred: 1) by granting Respondent's motion in limine precluding argument, evidence, and instruction regarding the doctrine of res ipsa loquitur; 2) by refusing to instruct the jury regarding negligence per se on the theory that Respondent violated the duty imposed on drivers by Vehicle Code section 21703 to follow at a safe distance; and 3) by altering the wording of the jury instruction on alternative causation.

We disagree with Appellants' contentions, and affirm the judgment entered by the trial court on April 25, 2017.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Events Leading Up to the Complaint*

On October 21, 2013, at approximately 10:00 a.m., a multiple rear-end automobile collision occurred on the westbound I-10 freeway near the Stewart Street exit in Santa Monica, California. Five vehicles were involved in this collision during heavy "stop-and-go" traffic.

Ernesto Gudino [1] started a chain reaction of accidents; Gudino was the driver of the last vehicle—a midsize U-Haul-type truck (vehicle No. 5)—and collided with the rear of vehicle No. 4, driven by Jorge Carhuamaca. Carhuamaca was stopped when Gudino collided with his vehicle. Carhuamaca's vehicle was then

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[1] Gudino was not a party to the underlying civil action.

pushed forward into vehicle No. 3, Robert Walsh's (hereinafter Respondent) vehicle. Respondent's vehicle was also at a complete stop when Carhuamaca's vehicle hit it from behind. Walsh's vehicle was then pushed forward into vehicle No. 2, Appellant Michael Ward's vehicle. Appellant Thomas Dunphy was a passenger in vehicle No. 2. There was a distance of "about one foot" between Respondent's vehicle and Appellants' vehicle. Ward's vehicle was also at a complete stop when it was hit, and there was a distance of several feet between his vehicle and vehicle No. 1. When Respondent's vehicle No. 3 collided with Ward's vehicle No. 2, Ward's vehicle was pushed forward into vehicle No. 1, driven by one Garza, not a party to the underlying civil action.

The accident caused Ward's seat to break completely and Ward was thrust into the back of the vehicle. His vehicle was completely totaled.

On December 20, 2014, Ward and Dunphy (hereinafter collectively Appellants) reached a settlement with Gudino, the driver of vehicle No. 5, for $13,000 each.

B. *Underlying Civil Action*

On June 25, 2015, Appellants filed a lawsuit against Respondent—the driver of vehicle No. 3—claiming he had negligently failed to leave sufficient space when he stopped behind Appellants' vehicle. Appellants argued that when Respondent stopped with only one foot between his car and Appellants' car in front of him, it "didn't leave any room for there to be an impact or for any avoidance of an accident." Appellants sought damages from Respondent to compensate them for the injuries they sustained in the accident.

On October 16, 2015, Respondent filed his answer to the complaint. He also filed a cross-complaint against the drivers of vehicle Nos. 4 and 5—Carhuamaca and Gudino (as well as the owner of the commercial truck driven by Gudino, Oscar Rivera). Respondent argued that Gudino started the chain reaction of accidents when it crashed into vehicle No. 4. Respondent further argued that Carhuamaca, the driver of vehicle No. 4, was a contributing factor in the collision, as Carhuamaca crashed into Respondent's own vehicle, which then crashed into Appellants' vehicle.

C. *Relevant Trial Court Proceedings and Rulings*

1. Respondent's Motion in Limine to Preclude Argument, Evidence, or Instruction Regarding Res Ipsa Loquitur

In March 2017, the parties filed various motions in limine. Respondent filed a motion in limine that sought to preclude argument, evidence, or instruction pertaining to the doctrine of res ipsa loquitur. One of the elements of this doctrine is that the injury "must have been caused by an agency or instrumentality within the exclusive control of the defendant." Respondent's counsel argued that "[t]his was a multi-vehicle collision. There was no way that any of the evidence can show that Mr. Walsh alone was the cause of this accident. None of the evidence that has been presented has shown that." Respondent argued that Appellants failed to present any evidence that Respondent "was the cause of this accident" as opposed to the drivers of the other vehicles (namely, Gudino and/or Carhuamaca). Respondent's counsel also brought to the court's attention that Appellants would then be guilty of the same negligence that they alleged against Respondent—failing to keep sufficient distance between their vehicle and the vehicle in front such that a collision

occurred— as Appellants' vehicle struck the vehicle in front of it as well. Appellants opposed this motion in limine.

The trial court granted Respondent's motion in limine. The court said, "I don't see how the res ipsa argument would be appropriate to give as an instruction in this case based on what I know at this time. [¶] . . . [¶] But if there is evidence that would support it, then you can bring it up. But you'd have to bring it up, and it has to be supported by evidence from the trial . . . ."

On March 29, 2017, Appellants renewed their request for a jury instruction on res ipsa loquitur "because it does apply in this case." Respondent again reminded the court that this "was a multi-vehicle collision" and that there is "no way that any of the evidence can show that Mr. Walsh alone was the cause of this accident." The court stuck with its initial ruling.

2. Jury Instruction (CACI No. 418) Regarding Negligence Per Se and the Duty of California Drivers under Vehicle Code Section 21703

On March 28, 2017, Appellants filed requests for certain jury instructions, including but not limited to instructions on the presumption of negligence—negligence per se— should the jurors find Respondent violated Vehicle Code section 21703. Vehicle Code section 21703 provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon, and the condition of, the roadway." Appellants argued that Respondent violated Vehicle Code section 21703 because he stopped only one foot behind Ward's vehicle just before the accident, which was not reasonable and prudent. Respondent's own expert, Michael Akerson, testified that when stopped in traffic, the closer one vehicle is to the vehicle before it,

the "more likely it would be to strike the . . . rear of the vehicle in front of it . . . ."

The court reasoned that because "this proposed CACI instruction . . . will depend on the evidence that's presented during the course of the trial", this instruction shall be revisited before the final set of jury instructions are read, so as to allow further discussion as to whether it is applicable based on the evidence presented at trial and whether "this particular instruction should be given."

On March 29, 2017, after the testimony of multiple witnesses, including the parties, and argument of counsel, the court found there was not enough evidence to establish negligence per se. The court found that Vehicle Code section 21703 does not adequately address a situation where, as here, Respondent was at a complete stop. The court said that it "read several of the notes that followed [section] 21703 of the Vehicle Code [and that the notes] do not seem to specifically address when . . . all the vehicles involved in this case, meaning the parties in this case, are stopped." The court further explained that "in looking at the language, 'follow' still seems to suggest[ ] to the court that it's movement" and that the statutory language "having due regard for speed" similarly does not apply in this case as "the cars were stopped."

The court stated that it does not believe "there is enough evidence at this point to establish this presumption of negligence per se," as the evidence thus far showed that the driver of vehicle No. 5 (the U-Haul-type truck) hit the car in front of him, causing a chain reaction of automobile collisions. The court explained that none of the other vehicles "rolled" into another vehicle, nor was there any evidence that the other vehicles were in the

process of stopping, as the other vehicles were already at a complete stop. The court therefore found the language in CACI No. 418 inappropriate based on the facts of the present matter because "this particular Vehicle Code [section] doesn't adequately address the circumstances of this case."

3. Jury Instruction (CACI No. 434) Regarding Alternate Causation

CACI No. 434, as amended by the court, stated: "You may decide that more than one of the ~~defendants~~ *parties* was negligent, but that the negligence of only one of them could have actually caused MICHAEL WARD and THOMAS DUNPHY's harm. If you cannot decide which ~~defendant~~ *party* caused MICHAEL WARD and THOMAS DUNPHY's harm, you must decide that each ~~defendant~~ *party* is responsible for the harm.

However, if a ~~defendant~~ *party* proves that he did not cause MICHAEL WARD and THOMAS DUNPHY's harm, then you must conclude that defendant is not responsible."

The parties argued about the wording of this requested CACI instruction as it related to comparative fault of Appellants, cross-defendant Carhuamaca, and non-party Gudino. Respondent argued that the instruction should include the names Walsh, Carhuamaca, and Gudino because there was evidence of alternative causation from other drivers. Expert testimony also established that the impact between Respondent's vehicle and Appellant Ward's vehicle would not have been prevented even if Respondent had stopped further behind Appellants.

Appellants, however, disagreed; they believed that the trial court's use of the term "party" or "parties" instead of "defendant" or "defendants" would confuse the jurors because it suggested there was alternative causation or negligence on the part of Appellants. Appellants' counsel argued that "including the word 'parties' [is] an implication that the [Appellants] were somehow at fault and they weren't." Appellants believed that because their case was against Respondent only, that the jury instruction regarding alternate causation should not even be included, as Appellants were not at fault and this case has "nothing to do with Mr. Carhuamaca or Mr. Gudino."

The court stated that "the jurors are going to have to weigh all of the evidence . . . and then assign comparative fault, if any, which includes zero." The court found that because the "jurors have the ability to assign no responsibility to any of the individuals named whether they're a party or not," CACI No. 434 was appropriately modified to reflect "party" or "parties," instead of "defendant" or "defendants."

D. *Special Verdicts and Judgment*

On March 29, 2017, the trial court instructed the jury. The jury considered the special verdict forms and found that Respondent and cross-defendant Carhuamaca were not negligent.

On April 25, 2017, the court entered judgment on the jury verdicts in favor of Respondent. The court also found Respondent was entitled to costs.

Appellants timely appealed.

DISCUSSION

We affirm the judgment entered by the trial court on April 25, 2017.

A. *The Trial Court Err Did Not Err by Refusing to Instruct on the Doctrine of Res Ipsa Loquitur.*

The standard of review of a ruling on a motion in limine will likely depend on the substance and effect of the motion; where the granting of a motion in limine "was tantamount to a nonsuit," the standard of review is the same as for a nonsuit, i.e., the appellate court will "view the evidence most favorably to appellants, resolving all presumptions, inferences and doubts in their favor, and uphold the judgment for respondents only if it was required as a matter of law." (*Edwards v. Centex Real Estate Corp*. (1997) 53 Cal.App.4th 15, 28; *Tan v. Arnel Management Co.* (2009) 170 Cal.App.4th 1087, 1094–1095.) In instances in which an in limine ruling does not preclude an entire claim but instead limits the evidence that will be offered to prove a claim, we review the ruling for an abuse of discretion. (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1294.) "The trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a 'miscarriage of justice'—that is, that a different result would have been probable if the error had not occurred." (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480.)

Here, the trial court's ruling on Respondent's motion in limine did not amount to a nonsuit, as Appellants' negligence claim against Respondent was not precluded and Appellants point to no factual evidence they were not allowed to present to the jury. Rather, it was solely Appellants' use of the res ipsa loquitur doctrine to prove Respondent's negligence that was precluded. We thus review the trial court's ruling for abuse of discretion.

Res ipsa loquitur is "a rule of evidence allowing an inference of negligence from proven facts. [Citations.] It is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, [citations], permitting a common sense inference of negligence from the happening of the accident. [Citations.] The rule thus assists plaintiffs in negligence cases in regard to the production of evidence." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 (*Gicking*).)

Res ipsa loquitur requires substantial evidence that satisfies "three conditions: ' "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." ' " (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826; *Gicking*, *supra*, 170 Cal.App.3d at p. 75; see *Elcome v. Chin* (2003) 110 Cal.App.4th 310, 316–317.) "The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible." (*Di Mare v. Cresci* (1962) 58 Cal.2d 292, 298–299.) " 'In considering the applicability of res ipsa, . . . [t]he court merely determines whether the plaintiff has produced sufficient substantial evidence to permit a jury to draw such an inference. Where reasonable [people] may differ as to the balance of probabilities, the trial judge must leave the question to the jury [citations].' " (*Albers v. Greyhound Corp.* (1970) 4 Cal.App.3d 463, 474.)

Here, Appellants failed to present substantial evidence justifying the invocation of res ipsa loquitur, as they did not

present evidence showing the harm was caused by something only Respondent Walsh controlled. Walsh's vehicle was indisputably pushed into Appellants' vehicle. The automobile accident could have been the result of negligence by the driver of vehicle No. 4 or vehicle No. 5—Carhuamaca and Gudino. In fact, the record established it was the impact of Gudino's U-Haul-type truck that set off the series of collisions that ultimately involved five vehicles. The problem here is that the negligence of a third party (namely, Gudino or Carhuamaca) could have been the probable cause of the accident. Appellants did not provide sufficient evidence to prove the accident was caused by an agency or instrumentality within the *exclusive* control of Respondent Walsh. Refusing to apply the doctrine of res ipsa loquitur to this series of collisions did not result in a miscarriage of justice. There was no abuse of discretion.

B. *The Trial Court Did Not Err by Refusing to Instruct the Jury on the Doctrine of Negligence Per Se and the Duty of California Drivers based on Vehicle Code section 21703.*

We apply the following settled principles in considering a claim of erroneously refused instructions. First, "[p]arties have the 'right to have the jury instructed as to the law applicable to all their theories of the case which were supported by the pleadings and the evidence, whether or not that evidence was considered persuasive by the trial court.' " (*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607.) Thus, a party is entitled upon request to an instruction on each theory of the case that is supported by the pleadings and by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) Second, we will only reverse if it is probable the error prejudicially affected the verdict. (*Rutherford v. Owens-Illinois, Inc.* (1997)

16 Cal.4th 953, 983.) In determining whether instructional error was prejudicial, a reviewing court "should consider not only the nature of the error, 'including its natural and probable effect on a party's ability to place his full case before the jury,' but the likelihood of actual prejudice as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' " (*Ibid.*)

The record reflects that the trial court heard and considered all of the evidence before it determined not to instruct the jury on negligence per se based on a violation of Vehicle Code 21703. The court found the duty imposed by Vehicle Code section 21703 inapplicable to the facts of this case.[2] The court looked at the language of the statute[3] and stated that " 'follow' still seems to suggest[ ] to the court that it's movement" and that the statutory language "having due regard for speed" similarly does not apply in this case as "the cars were stopped."

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[2] In their brief, Appellants rely primarily on *Harding v. Purtle* (1969) 275 Cal.App.2d 396 (previously entitled *Harding v. MacDougal*) and *Kramer v. Barnes* (1963) 212 Cal.App.2d 440, which the trial court considered on March 29, 2017 when it made its determination. We do not substitute our judgment for that of the trial court, and may grant relief only when the asserted abuse of discretion constitutes a miscarriage of justice. (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 44.)

[3] Vehicle Code section 21703 provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway."

The court found there was insufficient evidence "to establish this presumption of negligence per se," as the evidence thus far showed that the driver of vehicle No. 5 (the U-Haul-type truck) hit the car in front of him, causing a chain reaction of automobile collisions. We concur with the trial court's finding that there is no substantial evidence supporting the application of a negligence per se theory. Vehicle Code section 21703 is directed at those drivers who "tailgate" while in motion without due regard to the speed of the flow of traffic. It does not apply to vehicles stopped on a freeway in stop-and-go traffic.[4]

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[4] During oral argument, Appellants' counsel cited *Banes v. Dunger* (1960) 181 Cal.App.2d 276 (*Banes*). Appellants argued the facts of *Banes* are similar to this case—the accident there involved multiple vehicles, with defendant's vehicle propelled from behind into the rear of plaintiff's vehicle by defendant No. 2. Appellants argued that the Court of Appeal in *Banes* found that the trial court erred in refusing to give plaintiff's proffered instructions on res ipsa loquitur. (*Id.* at pp. 280–282). We find *Banes* inapplicable to this case, as the trial court there had erred by refusing plaintiff's instructions on qualified res ipsa loquitur while also instructing the jury that the mere occurrence of the accident did not create a presumption or an inference of defendant's negligence. (*Ibid.*)

C. *The Substitution of Terms in Jury Instruction (CACI No. 434) Was Not Error.*

Appellants argued that because their negligence claim was against Walsh alone, the jury instruction regarding alternate causation should not have been included because it invited jurors to believe that the Appellants or other individuals (i.e., Gudino or Carhuamaca) were at fault. Appellants stated in their brief, "There was no need . . . to give CACI [No.] 434 in any form" because "CACI [No.] 434, setting out the alternative liability theory, was inapplicable." Appellants also argued that the trial court's use of the term "party" or "parties" instead of "defendant" or "defendants" would confuse the jurors because it suggested there was alternative causation or negligence on the part of Appellants.

We find the trial court's substitution of the term "party" and "parties" for the terms "defendant" and "defendants" did not result in a miscarriage of justice for two reasons. First, the issue is moot because the jury never reached the point where it had to consider the issue of alternative causation. The jury answered

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Further, in *Banes*, there was a conflict in the evidence as to whether defendant's vehicle was at a full stop prior to being rear-ended by defendant No. 2, as defendant No. 2 had argued that defendant's vehicle's brake lights went on and there wasn't enough distance left for defendant No. 2 to stop without impacting the rear of defendant's vehicle. (*Banes*, *supra*, 181 Cal.App.2d at p. 280.) In the case before us, however, it is undisputed Respondent's vehicle was at a full stop prior to being hit from behind by Carhuamaca. Thus, we do not find *Banes* controlling.

questions 1 and 2 of the special verdict form,[5] which asked the jury whether Respondent and cross-defendant Carhuamaca were negligent. The jury found no negligence by either person and returned the verdict form, as instructed, without considering any of the questions that followed, including those pertaining to causation. Causation never became an issue.

Second, by adding "parties" the trial court simply added the correct notion that the Appellants theoretically could have been responsible for causing some of the harm they suffered. The instruction is consistent with the special verdict form submitted to the jury. Moreover, there is nothing in the instruction that would cause a jury to misunderstand the elements of the cause of action for negligence. In sum, there is nothing to suggest that this altered instruction in some way "tainted" the instructions as a whole, thereby setting up a miscarriage of justice. (*See Soule*, *supra*, 8 Cal.4th at p. 580.) The facts of this case and common sense compelled the jury to evaluate the actions of all the drivers in the collision chain, whether or not each driver was a plaintiff or defendant.

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[5] Question 3 asked whether Appellant Ward was negligent. The remaining questions addressed causation and apportionment of responsibility between Respondent, Carhuamaca, Appellant Ward, and non-party Gudino.

DISPOSITION

The judgment entered by the trial court on April 25, 2017 is affirmed. Respondent is awarded costs on appeal.

STRATTON, J.

We concur:

BIGELOW, P. J.

RUBIN, J.*

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* Presiding Justice of the Court of Appeal, Second Appellate. District, Division Five, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.